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**DEPARTMENT OF THE TREASURY**

**Office of the Comptroller of the Currency**

**12 CFR Part 101**

**[Docket ID OCC-2018-0020]**

**RIN 1557-AE45**

**Covered Savings Associations**

**AGENCY:** Office of the Comptroller of the Currency (OCC), Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The OCC is inviting comment on a proposed rule to implement a new section of the Home Owners' Loan Act (HOLA). The Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA) amended HOLA to add a new section that allows a Federal savings association with total consolidated assets of \$20 billion or less, as of December 31, 2017, to elect to operate as a covered savings association. A covered savings association has the same rights and privileges as a national bank and is subject to the same duties and restrictions as a national bank. A covered savings association retains its Federal savings association charter and existing governance framework. The new section of HOLA requires the OCC to issue rules that, among other things, establish streamlined standards and procedures for elections to operate as covered savings associations and clarify requirements for the treatment of covered savings associations.

**DATES:** Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments to the OCC by any of the methods set forth below. Commenters are encouraged to submit comments through the Federal eRulemaking Portal or e-mail, if possible. Please use the title “Covered Savings Associations” to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- Federal eRulemaking Portal—“Regulations.gov”: Go to *www.regulations.gov*. Enter “Docket ID OCC-2018-0020” in the Search Box and click “Search.” Click on “Comment Now” to submit public comments. Click on the “Help” tab on the Regulations.gov home page to get information on using Regulations.gov, including instructions for submitting public comments.
- E-mail: *regs.comments@occ.treas.gov*.
- Mail: Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 400 7<sup>th</sup> Street, SW., suite 3E-218, Washington, DC 20219.
- Hand Delivery/Courier: 400 7<sup>th</sup> Street, SW., suite 3E-218, Washington, DC 20219.
- Fax: (571) 465-4326.

Instructions: You must include “OCC” as the agency name and “Docket ID OCC-2018-0020” in your comment. In general, the OCC will enter all comments received into the docket and publish the comments on the Regulations.gov website without change, including any business or personal information that you provide such as name and address information, e-mail addresses, or phone numbers. Comments received,

including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this rulemaking action by any of the following methods:

- Viewing Comments Electronically: Go to *www.regulations.gov*. Enter “Docket ID OCC-2018-0020” in the Search box and click “Search.” Click on “Open Docket Folder” on the right side of the screen. Comments and supporting materials can be viewed and filtered by clicking on “View all documents and comments in this docket” and then using the filtering tools on the left side of the screen.
- Click on the “Help” tab on the Regulations.gov home page to get information on using Regulations.gov. The docket may be viewed after the close of the comment period in the same manner as during the comment period.
- Viewing Comments Personally: You may personally inspect comments at the OCC, 400 7<sup>th</sup> Street, SW., Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649-6700 or, for persons who are deaf or hearing impaired, TTY, (202) 649-5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect comments.

**FOR FURTHER INFORMATION CONTACT:** For additional information, contact Charlotte Bahin, Senior Advisor for Thrift Supervision, 202-649-6281, Lazaro Barreiro, Director for Governance and Operational Risk Policy, 202-649-6550, Alison MacDonald, Special Counsel, 202-649-5490, Priscilla Benner, Attorney, 202-649-5490, Marta

Stewart-Bates, Attorney, 202-649-5490, Frances C. Augello, Special Counsel, 202-649-5500, Demetria C. Hannah, Special Counsel, 202-649-5500, or Kevin S. Kirby, Attorney, 202-649-5500, Chief Counsel's Office, for persons who are deaf or hearing impaired, TTY, 202-649-5597, Office of the Comptroller of the Currency, 400 7<sup>th</sup> Street, SW., Washington, DC 20219.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

Section 206 of the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA), Public Law 115-174, 132 Stat. 1310, amended the Home Owners' Loan Act (HOLA) (12 U.S.C. 1461 et seq.) to add a new section 5A (12 U.S.C. 1464a) that allows a Federal savings association with total consolidated assets of \$20 billion or less, as of December 31, 2017, to elect to operate as a covered savings association.

A covered savings association has the same rights and privileges as a national bank that has its main office situated in the same location as the home office of the covered savings association. A covered savings association is subject to the same duties, restrictions, penalties, liabilities, conditions, and limitations that would apply to such a national bank. However, a covered savings association retains its Federal savings association charter and continues to be treated as a Federal savings association for purposes of governance, including for purposes of procedures and requirements governing incorporation and organization, procedures and requirements governing charter and bylaws (e.g., form, amendments), board of director governance procedures

and requirements (e.g., elections, term of service), shareholder governance procedures and requirements (e.g., meetings, voting requirements), and requirements governing distribution of dividends (e.g., payment, prior approval, and other restrictions). A covered savings association also is treated as a Federal savings association for purposes of consolidation, merger, dissolution, conversion (including conversion to a stock bank or another charter), conservatorship, and receivership, and for other purposes determined by OCC regulation. A covered savings association may continue to operate any branch or agency that the covered savings association operates on the date an election to operate as a covered savings association takes effect. A covered savings association will continue to be treated as a covered savings association even if its assets exceed \$20 billion after it makes an election.<sup>1</sup>

Section 5A of HOLA requires the OCC to issue rules to carry out that section. The OCC must issue rules that: 1) establish streamlined standards and procedures that clearly identify required documentation and timelines for an election; 2) require a Federal savings association that makes an election to identify specific assets and subsidiaries held by the Federal savings association that do not conform to the requirements for national banks (“nonconforming assets and subsidiaries”); 3) establish a transition process for bringing the nonconforming assets and subsidiaries into conformance with the requirements for national banks and procedures for allowing a Federal savings association to submit an application to continue to hold nonconforming assets and subsidiaries after electing to operate as a covered savings association; 4) establish standards and procedures to allow a covered savings association to terminate an election

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<sup>1</sup> 12 U.S.C. 1464a(g).

after an appropriate period of time and to make a subsequent election after terminating an election; and 5) clarify requirements for the treatment of covered savings associations, including the provisions of law that apply to covered savings associations. Section 5A also gives the OCC the authority to issue rules as the Comptroller determines necessary in the interests of safety and soundness.

The OCC views section 5A of HOLA as a way to provide Federal savings associations with additional flexibility to adapt to new economic conditions and business environments without the cost and time involved in changing their charters.<sup>2</sup> This flexibility will allow Federal savings associations to better meet the needs of their communities.

For example, section 10(m) of HOLA requires a Federal savings association to maintain its status as a qualified thrift lender (QTL) by either holding a specified percentage of its assets in qualified thrift investments or qualifying as a domestic building and loan association as defined in the Internal Revenue Code.<sup>3</sup> Further, prior to the enactment of section 5A of HOLA, a Federal savings association would have been required to convert to a bank charter to pursue a business strategy involving greater commercial or consumer lending if it would have exceeded the investment limits in HOLA. The OCC has heard for a number of years that Federal savings associations would like to engage in additional activities (for example, additional commercial or small business lending and consumer lending) to serve their communities, but they cannot increase lending in those areas because of the statutory lending limits and limitations

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<sup>2</sup> See Testimony of Acting Comptroller of the Currency Keith A. Noreika before the Committee on Banking, Housing, and Urban Affairs, United States Senate, June 22, 2017, at 22.

<sup>3</sup> 12 U.S.C. 1467a(m).

imposed on the operating strategies of Federal savings associations that are required to comply with QTL. In 2015, the OCC reported this information in written testimony to Congress.<sup>4</sup> The OCC noted that the charter conversion process can be time consuming and burdensome, particularly for smaller savings associations. At that time, Federal mutual savings associations faced an especially burdensome process, because they would have had to convert to the stock form of organization before converting to a national bank charter. As discussed in more detail later in this preamble, under the new section 5A of HOLA, a Federal savings association, whether in stock or mutual form, can adjust its business model without the additional burden and expense of changing charters.

As the supervisor of both national banks and Federal savings associations, the OCC is well-positioned to administer section 5A. OCC examination staff are familiar with the unique situations and business models of individual institutions and with national bank and Federal savings association laws.<sup>5</sup>

This proposed rule would implement section 5A in a manner that minimizes regulatory burden on Federal savings associations seeking to be treated as covered savings associations while ensuring that these Federal savings associations can continue to operate safely and soundly. The election process set out in the proposed rule is intended to be simple and streamlined. The proposed rule takes a similarly streamlined approach for the procedures and standards applicable to terminations of elections and to reelections.

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<sup>4</sup> See Written Statement of Toney Bland, Senior Deputy Comptroller for Midsize and Community Bank Supervision, Office of the Comptroller of the Currency, before the Committee on Banking, Housing and Urban Affairs, United States Senate, February 10, 2015, at 9-10.

<sup>5</sup> Id.

The OCC also is mindful of the need to permit all OCC-supervised institutions to engage in the same activities to the extent permitted by different statutory frameworks. The proposed rule does not confer rights or privileges on covered savings associations that would not be available to similarly located national banks, except as required by section 5A of HOLA or specifically set out in the proposed rule. Under the proposed rule, covered savings associations would be required to divest, conform, or discontinue nonconforming subsidiaries, assets, and activities, with appropriate lead-time, so that they do not operate, hold, or conduct subsidiaries, assets, or activities that would not be permissible for a national bank. Consistent with section 5A, the proposed rule would treat covered savings associations and national banks differently when necessary to allow a covered savings association to retain its Federal savings association charter and associated governance processes. To reduce unnecessary burden, the proposed rule also would allow covered savings associations to continue to use Federal savings association procedures rather than national bank procedures where the application of those procedures would not result in substantively different outcomes. For example, a covered savings association would be subject to the Federal savings association requirements for adjudicative proceedings under 12 CFR parts 108 and 109 rather than the national bank requirements under 12 CFR part 19.

## **II. Description of the Proposal**

*101.1 Authority and purposes.* Paragraph (a) of this section provides that the proposed rule is issued pursuant to sections 3, 4, 5, and 5A of HOLA (12 U.S.C. 1462a, 1463, 1464, and 1464a), section 5239A of the Revised Statutes (12 U.S.C. 93a), and



section 312(b)(2)(B) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5412(b)(2)(B)).

Paragraph (b) of this section describes the purposes of the proposed rule. Those purposes are to establish standards and procedures for an election to operate as a covered savings association, to clarify the requirements that apply to covered savings associations, and to establish standards and procedures for terminations of elections and for reelections.

*101.2 Definitions and computation of time.* Paragraph (a) of this section sets out definitions for the proposed rule.

Paragraph (a)(1) of this section defines the term “appropriate OCC supervisory office.” As in 12 CFR 5.3(d), the appropriate OCC supervisory office is the OCC office responsible for supervision of a Federal savings association, as described in subpart A of 12 CFR part 4. The definition is intended to help Federal savings associations identify the office that can assist them with issues related to an election, a request to terminate, or a reelection.

Paragraph (a)(2) of this section defines the term “covered savings association.” This definition, consistent with the definition of the term in section 5A(a) of HOLA, refers to a Federal savings association that has made an election that is in effect in accordance with § 101.3(b) of the proposed rule.

Paragraph (a)(3) of this section defines the term “effective date of the election” as the date on which a Federal savings association’s election to operate as a covered savings association takes effect pursuant to § 101.3(b) of the proposed rule.

Paragraph (a)(4) of this section defines the term “nonconforming subsidiary, asset, or activity.” When this term is applied to a covered savings association, it means a subsidiary, asset, or activity that is not permissible for a covered savings association or, if permissible, is being operated, held, or conducted in a manner that exceeds the limit applicable to a covered savings association. When applied to a covered savings association, this term includes an investment in a subsidiary or other entity if that investment is not permissible for a covered savings association. When this term is applied to a Federal savings association that has terminated an election to operate as a covered savings association, it means a subsidiary, asset, or activity that is not permissible for a Federal savings association, or if permissible, is being operated, held, or conducted in a manner that exceeds the limit applicable to a Federal savings association. When applied to a Federal savings association that has terminated an election to operate as a covered savings association, this term includes an investment in a subsidiary or other entity if that investment is not permissible for a Federal savings association.

Section 5A(f) of HOLA uses the term “assets and subsidiaries.” However, under section 5A(c)(2) of HOLA, a covered savings association would be subject to the same duties, restrictions, penalties, liabilities, conditions, and limitations that apply to a similarly located national bank. As a result, a covered savings association’s activities would be limited in ways that a Federal savings association’s activities would not. For example, under 12 U.S.C. 1464(c)(4)(B) and 12 CFR 5.59, a Federal savings association can invest in a service corporation, but a national bank cannot. Some activities a Federal savings association may conduct in a service corporation (e.g., acquiring real estate for

development) are not permissible for a national bank.<sup>6</sup> Consistent with section 5A(c)(2) of HOLA, the proposed rule would require covered savings associations to cease those activities that would not be permissible for a national bank. As discussed below, the OCC proposes to establish the same transition process for discontinuing nonconforming activities as it does for divesting nonconforming assets and subsidiaries.

Paragraph (a)(5) of this section defines “similarly located national bank” to mean, with respect to a covered savings association, a national bank that has its main office situated in the same location as the home office of the covered savings association. For purposes of the proposed rule, the location of a national bank’s main office is the home state of the national bank. The location of a covered savings association’s home office is the home state of the covered savings association.

Paragraph (b) of this section provides that, for purposes of the proposed rule, the OCC will compute time in the same manner as set forth in 12 CFR 5.12. That section provides that, in computing a period of days, the OCC does not include the day of the act (in this case, the date the OCC receives a notice of election or termination) from which the period begins to run. If the last day of the time period is a Saturday, Sunday, or Federal holiday, the time period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday.

*101.3 Procedures and standard of review.* Under section 5A(b) of HOLA, a Federal savings association with total consolidated assets of \$20 billion or less as of December 31, 2017, may elect to operate as a covered savings association by submitting a notice to the Comptroller. The Federal savings association is deemed approved to

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<sup>6</sup> 12 CFR 5.59(f)(5).

operate as a covered savings association beginning 60 days after the Comptroller receives the notice, unless the Comptroller notifies the association that the association is not eligible.<sup>7</sup> This section of the proposed rule establishes streamlined standards and procedures that identify required documentation and timelines for an election to operate as a covered savings association. The proposed rule would establish procedures that are as simple and straightforward as possible.

Section 101.3(a)(1) of the proposed rule allows a Federal savings association that had total consolidated assets of \$20 billion or less as of December 31, 2017, to make an election to operate as a covered savings association by submitting a notice to the appropriate OCC supervisory office. The OCC proposes to use the Consolidated Reports of Condition and Income (Call Report) submitted for the quarter ending December 31, 2017, to determine if the Federal savings association meets this threshold. Because section 5A of HOLA contemplates that “a Federal savings association” with a certain amount of assets “as of December 31, 2017,” may make an election, under the proposed rule, institutions that were not Federal savings associations as of December 31, 2017, are not eligible to operate as covered savings associations.

Under this approach, an institution that was a credit union, state savings association, or state bank on December 31, 2017, but that later converted to a Federal savings association charter, would not be eligible to make an election under the proposed rule. Similarly, a de novo Federal savings association chartered after December 31, 2017, would not be eligible to make an election to operate as a covered savings association. A Federal savings association in stock form would retain the option to convert directly to a

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<sup>7</sup> The proposed rule also would allow the OCC to notify a Federal savings association that it is eligible before the full 60-day period has elapsed.

national bank charter, but for institutions in mutual form, such as credit unions, state savings associations, or state savings banks, a national bank charter is not available without first converting to stock form. The OCC invites comment on whether the option to elect to operate as a covered savings association should be limited to institutions that were Federal savings associations on December 31, 2017.

Paragraph (a)(1) of this section would require a Federal savings association to submit a notice to the appropriate OCC supervisory office. The appropriate OCC supervisory office has an established relationship with the Federal savings associations it supervises, and it is in regular quarterly contact with management of Federal savings associations. As a result, the supervisory office will be familiar with the condition and operations of a Federal savings association that submits a notice.

The OCC encourages management of Federal savings associations to contact the appropriate OCC supervisory office to determine whether it would be useful to meet before submitting a notice under this section. The OCC believes such meetings can be beneficial to the management of Federal savings associations considering operating as covered savings associations, particularly Federal savings associations that may operate, hold, or conduct nonconforming subsidiaries, assets, or activities or that are operating under outstanding enforcement actions or matters requiring attention. These informal conversations could help address potential issues before a Federal savings association submits a notice.

The proposed rule would require that a notice: be signed by a duly authorized officer of the Federal savings association; identify each branch and agency that the Federal savings association will operate on the effective date of the election that has not

been the subject of an application or notice under 12 CFR part 5; and identify and describe each nonconforming subsidiary, asset, or activity that the Federal savings association operates, holds, or conducts at the time it submits the notice, each of which must be divested, conformed, or discontinued pursuant to § 101.5.

The requirement for a signature of a duly authorized officer of the Federal savings association is intended to allow the Federal savings association to demonstrate that it has obtained any approval that may be required under its own internal procedures for making strategic decisions of this type.

The proposed rule would require that the notice identify branches and agencies that the Federal savings association will operate on the date an election takes effect, and that have not been the subject of an application or notice under 12 CFR part 5, in order to determine which branches and agencies are eligible to be grandfathered pursuant to section 5A(e) of HOLA and § 101.4(b) of the proposed rule. Federal savings associations are already required under 12 CFR part 5 to submit applications or notices to the OCC with respect to branches and agencies (for example, when establishing, acquiring, or relocating branches or establishing agencies). The proposed rule would only require a Federal savings association to identify branches or agencies for which the Federal savings association has not already submitted an application or notice. These are likely to be branches or agencies that are newly established at the time of an election under the proposed rule.

The proposed rule would require Federal savings associations to identify nonconforming subsidiaries, assets, and activities because these are the subsidiaries, assets, and activities the Federal savings association would need to divest, conform, or

discontinue pursuant to section 5A(f)(3) of HOLA and § 101.5 of the proposed rule after an election takes effect. Consistent with section 5A(f)(2) of HOLA, the OCC would expect a Federal savings association to identify subsidiaries, assets, and activities operated, held, or conducted at the time it submits a notice of election. The OCC expects that the description of the subsidiaries, assets, and activities would specify whether an asset or activity is held or conducted by the Federal savings association itself or by a subsidiary. The description of these subsidiaries, assets, and activities should be sufficient to allow the OCC to understand the size of the subsidiaries or assets and the scope of the activities relative to the asset size or capital of the Federal savings association. However, given the possibility of fluctuations, the OCC understands that the value of a subsidiary, asset, or activity at any given point in time might not reflect its usual size or scope. The OCC invites comment on whether the proposed rule should specify metrics for determining the size or scope of a subsidiary, asset, or activity, and, if so, whether those metrics should reflect a specific point in time.

Under § 101.3(b) of the proposed rule, a Federal savings association's election to operate as a covered savings association would automatically take effect 60 days after the OCC receives a notice from the Federal savings association, unless the OCC notifies the Federal savings association that it is not eligible in accordance with paragraph (c). The OCC also could notify a Federal savings association that it is eligible to operate as a covered savings association before 60 days have elapsed. The proposed rule does not include a provision for written notification if an election takes effect by operation of law, but the OCC would expect to provide such notification as a matter of course. The OCC expects that such a notification would state that a Federal savings association is subject to

the covered savings association laws, as described in § 101.4 of the proposed rule, once an election takes effect. Such a notification would have no impact on whether or when an election takes effect.

Section 101.3(c) of the proposed rule permits the OCC to notify a Federal savings association in writing that it is not eligible to make an election to operate as a covered savings association if the Federal savings association is not an “eligible savings association” as that term is defined in 12 CFR 5.3(g). Under the definition in 12 CFR 5.3(g), an eligible savings association is a Federal savings association that 1) is well capitalized as defined in 12 CFR 6.4; 2) has a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System (CAMELS); 3) has a Community Reinvestment Act (CRA) rating of “outstanding” or “satisfactory,” if applicable; 4) has a consumer compliance rating of 1 or 2 under the Uniform Interagency Consumer Compliance Rating System; and 5) is not subject to a cease and desist order, consent order, formal written agreement, or Prompt Corrective Action directive or, if subject to any such order, agreement, or directive, is informed in writing by the OCC that the savings association may be treated as an “eligible savings association” for purposes of 12 CFR part 5. Because the purposes of 12 CFR part 5 and the purposes of the proposed rule are different, the proposed rule specifies that a Federal savings association that is subject to a cease and desist order, consent order, formal written agreement, or Prompt Corrective Act directive would not be eligible to elect to operate as a covered savings association unless the OCC informs it in writing that it is eligible for purposes of part 101 (that is, for purposes of the proposed rule).



The concept of an “eligible savings association” as described in 12 CFR 5.3(g) is well understood and relatively straightforward to apply. In the licensing context, an “eligible savings association” may receive expedited review of filings because it is generally the type of savings association that can operate safely and soundly. In the context of the proposed rule, a Federal savings association that meets the definition of “eligible savings association” typically does not raise the types of concerns that would suggest it should not operate as a covered savings association.

The OCC invites comment on whether there are standards other than those in the definition of “eligible savings association” in 12 CFR 5.3(g) that would allow the OCC to determine, without imposing undue burden, whether a Federal savings association is eligible to operate as covered savings association. The OCC also invites comment on whether there are situations in which, or Federal savings associations for which, it would not be appropriate to use the definition of “eligible savings association” to make determinations about the eligibility of a Federal savings association to operate as covered savings associations. Additionally, the OCC invites comment on whether the rule should identify other factors for consideration when determining a Federal savings association’s eligibility to operate as a covered savings association.

The proposed rule would not require a Federal savings association to amend its charter or bylaws or to obtain the approval of shareholders or members before submitting a notice to the OCC. The model Federal savings association charter allows a Federal savings association to pursue any lawful objectives of a Federal savings association chartered under section 5 of HOLA. Section 5A of HOLA permits covered savings associations to engage in activities that would be permissible for a national bank.

Covered savings associations will continue to be Federal savings associations chartered under section 5 of HOLA, as neither the proposed rule nor the statute requires a charter conversion.

Nevertheless, management of a Federal savings association that is interested in submitting a notice to elect to operate as a covered savings association should review the Federal savings association's charter and bylaws, as well as any other applicable law, to determine whether an election will require shareholder or member approval or whether it should amend its charter or bylaws because the documents contain terms that are inconsistent with the rights and duties of a covered savings association.

*101.4 Treatment of covered savings associations.* Section 5A(c) of HOLA provides that a covered savings association has the same rights and privileges as a national bank that has the main office of the national bank situated in the same location as the home office of the covered savings association and is subject to the same duties, restrictions, penalties, liabilities, conditions, and limitations that would apply to such a national bank. Section 5A(d) of HOLA also specifies that a covered savings association is treated as a Federal savings association for the purposes of governance of the covered savings association, including incorporation, bylaws, boards of directors, shareholders, and distribution of dividends, as well as for purposes of consolidation, merger, dissolution, conversion (including conversion to a stock bank or to another charter), conservatorship, and receivership. Section 5A(d)(3) gives the OCC the authority to identify by regulation other purposes for which a covered savings association will be treated as a Federal savings association. Within that general framework, section 5A(f)(5) of HOLA directs the OCC to clarify the requirements for the treatment of covered

savings associations, including the provisions of law that apply to a covered savings association. Although, for many purposes, the regulations that apply to national banks are identical to the regulations that apply to Federal savings associations, there are provisions of Federal savings association law that are neither identical to national bank laws nor explicitly identified in section 5A(d) as purposes for which Federal savings association laws continue to apply to covered savings associations. For these provisions of law, the OCC seeks to clarify the legal framework that will apply while preserving the OCC's flexibility to address novel situations and unforeseen questions.

The proposed rule offers two alternatives to explain what it means for a covered savings association to have the rights and privileges of a similarly located national bank while being subject to the same duties, restrictions, penalties, liabilities, conditions, and limitations as a similarly located national bank.

The first alternative would require a covered savings association to comply with the same provisions of law that would apply to a similarly located national bank and would not require it to comply with the provisions of law that apply to Federal savings associations, except in specific areas identified in § 101.4(a)(2) of the proposed rule, such as governance (including incorporation, bylaws, boards of directors, shareholders, and distribution of dividends), consolidation, merger, dissolution, conversion (including conversion to a stock bank or to another charter), conservatorship, and receivership. In these specific areas, the laws otherwise applicable to a Federal savings association will apply to a covered savings association.<sup>8</sup>

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<sup>8</sup> For convenience, this preamble refers to these areas as “the Federal savings association categories.” They are discussed in greater detail later in this preamble.

The first alternative would provide a framework for a covered savings association to understand the provisions of law that apply to it: that is, national bank provisions will apply, except where specifically set out in the proposed rule, and Federal savings association laws will not apply, except where specifically set out in the proposed rule. However, there may be circumstances where it would not be appropriate to apply a provision of national bank law to a covered savings association. Under the first alternative, unless that provision of national bank law is included in one of the Federal savings association categories, the OCC may not have the flexibility to decline to apply it to a covered savings association without amending the rule. The OCC invites comment on whether there are situations in which the first alternative would inappropriately apply provisions of national bank law to a covered savings association. The OCC also invites comment on whether the first alternative, if adopted, should include a reservation of authority to allow the OCC to determine that a particular provision of national bank law should not apply to covered savings associations. Would the framework of this alternative give covered savings associations and other interested persons sufficient notice of the provisions of law that do and do not apply to covered savings associations? Would the latitude provided to the OCC under a reservation of authority make this first alternative more workable?

The second alternative focuses on the activities that would be permissible for a covered savings association. It is based on the requirements for operating subsidiaries of national banks set out in 12 CFR 5.34(e). This alternative would provide that a covered savings association may engage in any activity that is permissible for a national bank to engage in as part of, or incidental to, the business of banking, or explicitly authorized by

statute for a national bank, subject to the same authorization, terms, and conditions that would apply to a similarly located national bank, as determined by the OCC for purposes of the proposed rule. Like the first alternative, this second alternative would be subject to an exception for provisions of law in the Federal savings association categories.

The second alternative provides general guidance about the types of activities in which a covered savings association would be permitted to engage. Covered savings associations would be able to refer to OCC publications such as “Activities Permissible for National Banks and Federal Savings Associations, Cumulative”<sup>9</sup> to find activities that are permissible for national banks. The OCC’s permissible activities document includes links to OCC advisory letters, interpretive letters, bulletins, and other resources that would help covered savings associations understand the authorization, terms, and conditions that apply to these permissible activities.

The second alternative is more narrowly tailored than the first alternative, and it preserves the OCC’s authority to determine that a particular provision of national bank law does not apply to covered savings associations. However, it may be difficult for a covered savings association to determine whether a particular provision of law is considered an “authorization,” “term,” or “condition” that applies to a covered savings association if that provision is not otherwise discussed in an OCC publication.

The OCC invites comment on which of these alternatives would best clarify the requirements for the treatment of covered savings associations, including the provisions of law that apply to covered savings associations. Are there provisions of law that would

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<sup>9</sup> October 2017, available at <https://www.occ.treas.gov/publications/publications-by-type/other-publications-reports/pub-other-activities-permissible-october-2017.pdf>.

not be clearly addressed by these alternatives? Are there situations in which these alternatives would not lead to an appropriate result?

Because section 5A(c) provides covered savings associations with the same rights and privileges as a similarly located national bank, subject to the same duties, restrictions, penalties, liabilities, conditions, and limitations that would apply to a similarly located national bank, both alternatives would allow a covered savings association to engage in activities to the same extent as a national bank. Except as provided in the proposed rule, a covered savings association would be permitted to engage in the same activities as a national bank, subject to the restrictions that would apply to a national bank rather than the restrictions that would apply to a Federal savings association.

Unlike national banks, Federal savings associations are required to comply with the QTL test,<sup>10</sup> which limits the majority of their activities and asset mix to those with a housing focus.<sup>11</sup> The QTL test is a defining distinction between the rights and privileges of a savings association and a national bank.<sup>12</sup> Following an election under section 5A, while it retains its charter, a covered savings association has all the same rights and privileges of, and is subject to the same duties, restrictions, penalties, liabilities, conditions, and limitations that would apply to, a similarly located national bank.<sup>13</sup>

Although section 5A provides that a covered savings association continues to be treated as a Federal savings association for certain enumerated areas and purposes such as

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<sup>10</sup> 12 U.S.C. 1467a(m).

<sup>11</sup> 12 U.S.C. 1467a(m)(3)(B).

<sup>12</sup> See, generally, Statement of Ellen Seidman, Director, Office of Thrift Supervision, before the Committee on Banking, Housing, and Urban Affairs, United States Senate, February 24, 1999. Other differences are, for example, a bar under section 11(a) of HOLA that prevents Federal savings associations from making loans to affiliates not engaged in activities permissible for a bank holding company under section 4(c) of the Bank Holding Company Act and other constraints on the amount of commercial lending.

<sup>13</sup> 12 U.S.C. 1464a(c).

governance and distribution of dividends, none of these enumerated areas or purposes relate to the QTL test, the other limitations in section 5(c), or the lending restrictions of section 11(a). A covered savings association cannot logically exercise the rights and privileges conferred on it under section 5A (and have the activities and asset mix permitted to a national bank) while simultaneously being subject to the limitations of the QTL test, section 5(c), or section 11(a) lending restrictions. Accordingly, a covered savings association under section 5A is not subject to, among other things, the QTL test and the restrictions in 12 U.S.C. 1467a(m)(3)(B) for failing to meet the QTL test.

A similar analysis applies to the limits on aggregate amounts of loans secured by liens on nonresidential real property,<sup>14</sup> additional restrictions on loans to a single borrower,<sup>15</sup> other borrowing limitations,<sup>16</sup> and certain affiliate transaction requirements.<sup>17</sup> Because national banks are not subject to the duties, restrictions, penalties, liabilities, or conditions described in these provisions (and the proposed rule does not require covered savings associations to continue to comply with these provisions, as described later in this preamble), covered savings associations would not be subject to these provisions.

In order to clarify the provisions of law that apply to covered savings associations, the OCC also must identify the purposes for which a covered savings association will be treated as a Federal savings association. Section 5A of HOLA sets out specific categories of activities where Federal savings association laws apply. Those categories are governance of the covered savings association (including incorporation, bylaws, boards of directors, shareholders, and distribution of dividends), consolidation, merger,

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<sup>14</sup> 12 U.S.C. 1464(c)(2)(B).

<sup>15</sup> 12 U.S.C. 1464(u) and 12 CFR part 32.

<sup>16</sup> 12 CFR 163.80.

<sup>17</sup> 12 U.S.C. 1468(a) and 12 CFR 223.72.

dissolution, conversion (including conversion to a stock bank or to another charter), conservatorship, and receivership. The OCC can exercise its interpretive authority to determine which Federal savings association laws fall into each of those categories. The chart below shows examples of Federal savings association laws with which the OCC proposes to require covered savings associations to comply because these examples fall into the categories specifically created by section 5A. The OCC proposes that the statutory category for provisions relating to “shareholders” be construed to include provisions relating to the members of Federal mutual savings associations.

<i>Statutory Category</i>	<i>Provision of Law</i>
Incorporation	12 CFR 5.20. This section sets out requirements for organizing a national bank or Federal savings association, including for establishment as a legal entity. Although many aspects of this section are identical for national banks and Federal savings associations, where there are differences, the Federal savings association requirements would apply to a covered savings association.
Bylaws	12 CFR 5.21. This section sets out the requirements for Federal mutual savings associations when adopting or amending the charters or bylaws.
Bylaws	12 CFR 5.22. This section sets out the requirements for stock Federal savings associations when adopting or amending the charters or bylaws.
Board of directors; bylaws	12 CFR 145.121. This section requires Federal savings associations to indemnify directors, officers, and employees.
Board of directors	12 CFR 163.33. This section sets out requirements for the composition of the board of directors of a Federal savings association.
Board of directors	12 CFR 163.47. This section sets out requirements for employee pension plans of Federal savings associations, which may be amended or terminated by the board of directors.
Board of directors	12 CFR 163.200. This section sets expectations for the directors, officers, and employees of Federal savings associations, particularly as it relates to conflicts of interest.
Board of directors	12 CFR 163.201. This section sets expectations for the directors and officers of Federal savings associations, particularly as it relates to corporate opportunity.
Board of directors	12 CFR 163.172(c), (d), and (e). These provisions establish requirements for directors and management of Federal savings



	associations to oversee and keep records pertaining to derivatives transactions.
Board of directors	12 CFR 163.176. This section requires the boards of directors of Federal savings associations to participate in interest rate risk management.
Board of directors	12 CFR 160.130. This section prohibits directors and officers from receiving loan procurement fees.
Shareholders (members)	12 CFR part 144. This part sets out rules for communications between members of Federal mutual savings associations. The national bank laws relating to shareholder communications do not adequately address the unique needs and rights of Federal mutual savings association members.
Shareholders (members)	12 CFR part 169. This part sets out rules for proxies in the mutual context. The national bank laws relating to proxies do not adequately address the unique needs and rights of Federal mutual savings association members.
Distribution of dividends	12 CFR 5.55. This section sets out requirements for capital distributions by Federal savings associations, including distributions of dividends. The entire section would apply to a covered savings association.
Consolidation	12 CFR 5.33. This section sets out requirements for business combinations involving a national bank or Federal savings association, including consolidation. Although many aspects of this section are identical for national banks and Federal savings associations, where there are differences, the Federal savings association requirements would apply to a covered savings association.
Merger	12 CFR 5.33. This section sets out requirements for business combinations involving a national bank or Federal savings association, including mergers. Although many aspects of this section are identical for national banks and Federal savings associations, where there are differences, the Federal savings association requirements would apply to a covered savings association.
Dissolution	12 CFR 5.48. This section sets out requirements for voluntary liquidation of a national bank or Federal savings association. Although many aspects of this section are identical for national banks and Federal savings associations, where there are differences, the Federal savings association requirements would apply to a covered savings association.
Conversion	12 CFR 5.25. This section sets out requirements for conversion from a national bank or Federal savings association to a state bank or state savings association. Although many aspects of this section are identical for national banks and Federal savings associations, where there are differences, the Federal savings association requirements would apply to a covered savings

	association.
Conversion	12 CFR part 192. This part sets out requirements for savings associations converting from mutual to stock form.
Conservatorship	12 U.S.C. 1464(d) and 1821(c). The statutes set forth the authorities for the appointment of a conservator for Federal savings associations.
Receivership	12 U.S.C. 1464(d) and 1821(c). The statutes set forth the authorities for the appointment of a receiver for Federal savings associations

These are the types of provisions that the OCC would expect to identify in guidance as governance-related provisions but would not expect to include in the text of the rule. The OCC invites comment on whether the particular provisions identified earlier in this preamble should be considered provisions of law that relate to governance (including incorporation, bylaws, boards of directors, shareholders, and distribution of dividends), consolidation, merger, dissolution, conversion (including conversion to a stock bank or to another charter), conservatorship, and receivership and whether there are other provisions of law that the OCC should identify. The OCC also invites comment on whether these provisions should be specifically identified in the rule rather than in guidance.

Under section 5A(d)(3) of HOLA, the OCC also has the discretion to identify, by rule, additional areas where Federal savings association laws apply to covered savings associations. There are three categories of laws for which this treatment would be appropriate. The first category consists of laws that allow Federal mutual savings associations to conduct business as mutual institutions. For example, 12 CFR 163.74 sets out rules for mutual capital certificates. There is no comparable provision for national banks. Likewise, 12 CFR 163.76 prohibits a Federal savings association from selling equity securities in its offices, unless the sale involves stock sold to convert the savings

association from the mutual to stock form. Sale of conversion stock in offices can promote a widespread distribution of conversion stock as required by the stock conversion regulations (see 12 CFR part 192) and help facilitate the success of a stock conversion. Because a similar rule does not exist for national banks, under the proposed rule, the requirements of 12 CFR 163.76 will continue to apply to the operations of a covered savings association in the event the savings association seeks to convert from the mutual to stock form of organization. The OCC proposes to continue to apply these types of Federal savings association requirements to covered savings associations.

The second area consists of rules that set out procedural and operational requirements for Federal savings associations but that do not result in substantively different outcomes for Federal savings associations and national banks. The OCC proposes to apply Federal savings association rules that set forth procedural and operational requirements to covered savings associations, because Federal savings associations have already developed the policies, procedures, and expertise to comply with the Federal savings association procedures.

The following chart sets out rules that set forth procedural and operational requirements:

<i>Applicable Federal savings association rule (applies to covered savings associations)</i>	<i>Comparable national bank rule (does not apply to covered savings associations)</i>
12 CFR parts 108 and 109, adjudicative proceedings	12 CFR part 19
12 CFR part 112, investigative proceedings	12 CFR part 19
12 CFR part 151, recordkeeping and confirmation for securities transactions	12 CFR part 12
12 CFR 5.56, inclusion of subordinated debt securities and mandatorily redeemable preferred stock of Federal savings associations as supplementary capital	12 CFR 5.47

12 CFR 5.45, increases in permanent capital	12 CFR 5.56
12 CFR part 168, security procedures	12 CFR part 21, subpart A

Finally, the OCC proposes to apply Federal savings association provisions where there is a specific Federal savings association rule with no corresponding specific national bank rule, but the Federal savings association rule sets out requirements that are consistent with supervisory expectations for national banks or is substantially similar to an interagency rule. For example, 12 CFR part 162 implements a statutory requirement in HOLA that requires Federal savings associations to use generally accepted accounting principles. Pursuant to the Federal Deposit Insurance Act at 12 U.S.C. 1831m and its implementing regulation at 12 CFR 363, all insured depository institutions are required to use generally accepted accounting principles. Similarly, 12 CFR 163.170(c) sets out expectations for maintenance of records with which the OCC also would expect a national bank to comply as a matter of course. The proposed rule also would treat covered savings associations as Federal savings associations for purposes of 12 CFR part 128, which sets out nondiscrimination requirements, and 12 CFR 163.27, which prohibits inaccurate or misrepresentative advertising.

The OCC invites comment on whether any of the provisions of Federal savings association law proposed earlier in this preamble to be applicable to covered savings associations should not apply to covered savings associations. The OCC also invites comment on whether the OCC should exercise its discretion under section 5A(d)(3) of HOLA to identify in this rule additional areas in which Federal savings association laws, rather than national bank laws, should apply to covered savings associations.

The OCC recognizes that the areas described earlier in this preamble may not be the only areas where it would be appropriate to apply provisions of Federal savings association laws to covered savings associations. Novel and unforeseen situations may arise in which it would be appropriate to apply a provision of Federal savings association law not identified earlier in this preamble to a covered savings association. The OCC solicits comment on whether it would be helpful to include a mechanism in this rule that would allow the OCC, in the future, to identify additional provisions of Federal savings association law that apply to covered savings associations, without amending this rule. Such a mechanism might consist of publishing an interpretive letter or updating a particular OCC publication.

In areas not specifically described earlier in this preamble, the proposed rule contemplates that national bank laws would apply to a covered savings association. For example, a covered savings association seeking to establish a de novo branch or close an existing branch would be subject to the statutes and regulations that govern the establishment or closing of a national bank branch.<sup>18</sup> Similarly, the requirement for employment agreements is not an area identified earlier in this preamble, so the Federal savings association rules in 12 CFR 163.39 would not apply.

The proposed rule also would require a covered savings association to comply with national bank law with respect to subsidiaries. Section 5A(f)(2) of HOLA directs the OCC to issue rules that require Federal savings associations making an election to identify “specific assets and subsidiaries” that do not conform to the requirements for assets and subsidiaries of a national bank. Section 5A(f)(3) requires that the OCC’s rules

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<sup>18</sup> See the discussion of section 5A(e) of HOLA later in this preamble, which allows a covered savings association to continue to operate branches it operated on the date its election is approved.

establish a transition process for bringing these assets and subsidiaries into conformance with the requirements for a national bank. This suggests that Congress may have intended to prohibit covered savings associations from retaining assets or subsidiaries, such as service corporations, in which a national bank would not be authorized to hold, operate, or invest. Consequently, the proposed rule would require a covered savings association to comply with national bank laws for purposes of forming new subsidiaries. Under § 101.4(a)(1) of the proposed rule, 12 CFR 5.34, 5.35, and 5.39, which respectively set out requirements for the formation of operating subsidiaries, bank service companies, and financial subsidiaries by national banks, would apply to covered savings associations. Similarly, 12 CFR 5.36, which addresses other equity investments by national banks, would apply to covered savings associations. Because 12 CFR 5.59, addressing Federal savings association service corporations, is not listed in § 101.4(a)(2) as a provision of Federal savings association law that continues to apply to covered savings associations, 12 CFR 5.59 would not apply.

Service corporations of Federal savings associations have been authorized to engage in a range of activities. Some of those activities are permissible for a national bank and some are not. Under the proposed rule, both subsidiaries and those activities conducted in a subsidiary that are impermissible for a national bank would be impermissible for a covered savings association. However, the OCC recognizes that a prohibition on operating a service corporation could have a significant effect on a covered savings association. The OCC invites comment on whether the rule should allow covered savings associations to continue to operate a service corporation, and under what

conditions, if the service corporation is engaged only in activities that would be permissible for a national bank.

The proposed rule would not apply section 5(i)(4) of HOLA to covered savings associations. Section 5(i)(4) of HOLA provides that Federal savings banks chartered prior to October 15, 1982, may continue to make any investment or engage in any activity not otherwise authorized under section 5 to the degree they were permitted to do so as a Federal savings bank prior to October 15, 1982.<sup>19</sup> In addition, any Federal savings bank in existence on August 9, 1989, that had been formerly organized as a mutual savings bank under State law may continue to make any investment or engage in any activity to the degree it was authorized to do so as a mutual savings bank under State law. Some of these investments and activities, although permissible for certain Federal savings associations, would not be permissible for a national bank. The proposed rule would not apply section 5(i)(4) of HOLA (or the implementing regulations at 12 CFR part 143) to a covered savings association, meaning that a Federal savings association with investments and activities grandfathered under that section would be required to divest any of those investments and discontinue any of those activities that would not be permissible for a national bank.

The proposed rule would require a covered savings association to comply with the national bank public welfare investment limits rather than the Federal savings association community development limits. National banks are subject to a public welfare investment limit of 15 percent of their capital and surplus, consistent with 12 U.S.C. 24(Eleventh) and 12 CFR part 24. The community development investment limits for Federal savings

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<sup>19</sup> These institutions also receive grandfathered treatment under section 18(m) of the Federal Deposit Insurance Act (12 U.S.C. 1828(m)).

associations are set out in 12 CFR 160.36 (less than or equal to the greater of 1 percent of the association's capital or \$250,000); section 5(c)(3)(A) of HOLA (12 U.S.C. 1464(c)(3)(A)) and 12 CFR 160.30, as interpreted by the Office of Thrift Supervision's May 10, 1995, Letter Regarding Community Development investments (aggregate community development loans and equity investments may not exceed 5 percent of the association's total assets, and, within that limitation, the association's aggregate equity investments may not exceed 2 percent of its total assets); and 12 CFR 5.59 (allowing the association to invest up to 3 percent of its assets in service corporations but providing that any amount exceeding 2 percent must serve "primarily community, inner-city, or community development purposes"). If a Federal savings association uses all or a portion of the investment limits permitted under the three legal authorities, it is possible that its aggregate community development investments would exceed the investment limits for national banks. As a result, applying national bank limitations to covered savings associations for purposes of public welfare and community development investments could require a Federal savings association that elects to operate as a covered savings association to divest some of its community development investments.<sup>20</sup> Divesting community development investments could have a negative impact on a covered savings association's community, and divestment may make it more difficult for the covered savings association to meet its requirements under the CRA. Given these potential consequences, the OCC invites comment on whether covered savings associations should

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<sup>20</sup> For example, a national bank with total consolidated assets of \$250 million would be subject to a public welfare investment limit of \$4,500,000 (15 percent of its capital and surplus if capital is 12 percent). A Federal savings association of the same size would be permitted to invest \$300,000 under 12 CFR 160.63, \$5,000,000 under 12 CFR 160.30, and \$2,500,000 under 12 CFR 5.59, for a total of \$12,300,000. If that Federal savings association elected to become a covered savings association, it would be required to divest \$7,800,000 of its community development investments to comply with the public welfare investment limit for national banks.



be treated as Federal savings associations for purposes of public welfare and community development investments.

Paragraph (b) of § 101.4 of the proposed rule provides that a covered savings association may continue to operate any branch or agency that the covered savings association operated on the effective date of the election. This provision implements section 5A(e) of HOLA.

Section 5A(g) of HOLA provides that a covered savings association can continue to operate as a covered savings association, even if its total consolidated assets grow to more than \$20 billion. Although this principle is not explicitly set out in the proposed rule, the OCC would apply it when supervising covered savings associations.

*101.5 Nonconforming subsidiaries, assets, and activities.* This section establishes a transition process for bringing nonconforming subsidiaries, assets, and activities into conformance with the requirements for national banks.

Paragraph (a) of § 101.5 would require a covered savings association to divest, conform, or discontinue nonconforming subsidiaries, assets, and activities at the earliest time that prudent judgment dictates but not later than two years after the effective date of an election. This requirement is consistent with paragraphs (2) and (3) of section 5A(f) of HOLA, which set out an expectation that covered savings associations will bring assets and subsidiaries that do not conform to the requirements for national banks into conformance with the requirements for national banks.

In keeping with the goal of maintaining a level playing field among OCC-supervised institutions, the proposed rule would require a covered savings association to divest, conform, or discontinue nonconforming subsidiaries, assets, and activities at the

earliest time prudent judgment dictates. Recognizing that circumstances may occasionally dictate that immediate divestment, conformance, or discontinuance is not prudent, the proposed rule would provide up to two years for such action. The two-year period for divesting, conforming, or discontinuing nonconforming subsidiaries, assets, and activities is the same period that the OCC would generally allow for a Federal savings association converting to a national bank. This period should, in most cases, provide a covered savings association with sufficient lead-time to minimize potential undue financial harm from divesting, conforming, or discontinuing nonconforming subsidiaries, assets, and activities. This period also is intended to be short enough to ensure that covered savings associations are not allowed to gain an advantage by holding or operating assets or subsidiaries or conducting activities that would not be permissible for a national bank. The OCC invites comment on whether a different period, such as the more general “reasonable time” standard set out in the conversion rules at 12 CFR 5.24, should apply.

Paragraph (a) of this section also provides that the OCC may require a covered savings association to submit a plan to divest, conform, or discontinue a nonconforming subsidiary, asset, or activity. Such a plan would assist OCC supervisory staff in assessing compliance with the proposed rule.

Paragraph (b) of this section would allow the OCC to grant a covered savings association extensions of not more than two years each up to a maximum of eight years if the OCC determines that: (1) the covered savings association has made a good faith effort to divest, conform, or discontinue the nonconforming subsidiaries, assets, or activities; (2) divestiture, conformance, or discontinuance would have a material adverse financial effect on the covered savings association; and (3) retention or continuation of the

nonconforming subsidiaries, assets, or activities is consistent with the safe and sound operation of the covered savings association. This paragraph is intended to provide the OCC with flexibility where a covered savings association, despite its best efforts, is unable to divest or conform assets or discontinue activities within the two-year period. For example, in cases where a covered savings association has a service corporation that owns nonconforming real estate in a market experiencing a significant and prolonged lack of demand, the OCC could grant an extension to allow market conditions to improve rather than requiring the covered savings association to sell the real estate within two years and take a loss on the property, provided the standards set forth in paragraph (b) are satisfied. The proposed rule limits the number of extensions to ensure that a covered savings association cannot retain or continue a nonconforming subsidiary, asset, or activity for more than 10 years past the effective date of an election. The 10-year period in the proposed rule is consistent with the 10-year limitation on possession of OREO by national banks under 12 U.S.C. 29. The limitation is intended to ensure that covered savings associations do not have the ability to retain or continue indefinitely subsidiaries, assets, or activities that would not be permissible for a national bank.

The OCC invites comment on whether there are any situations in which it would be appropriate for a covered savings association to retain a nonconforming subsidiary or asset or continue a nonconforming activity for longer than 10 years. What characteristics do these subsidiaries, assets, or activities have that would make it appropriate for them to be treated differently than other nonconforming subsidiaries, assets, or activities (for example, would conforming result in particularly severe adverse consequences)? If the rule permits a subsidiary, asset, or activity to be retained or continued for longer than 10

years, should the OCC limit the ability of a covered savings association to expand the subsidiary, asset, or activity?

Paragraph (c) of this section of the proposed rule provides that Federal savings association law would continue to apply to nonconforming subsidiaries, assets, and activities during the period before the covered savings association divests, conforms, or discontinues the subsidiary, asset, or activity. This provision is intended to clarify the treatment of nonconforming subsidiaries, assets, and activities during the transition period.

*101.6 Termination.* This section would establish standards and procedures to allow a covered savings association to terminate an election after an appropriate period of time.

Under § 101.6(a) of the proposed rule, a covered savings association may request to terminate an election after an appropriate period of time, as determined by the OCC. The OCC would generally view an appropriate period of time to be relatively soon after an election takes effect (for example, 60 or 90 days). However, the OCC might determine that a longer period of time is appropriate where there is evidence that a covered savings association is attempting to use a termination to evade the requirements or purposes of section 5A of HOLA, such as the requirement to divest, conform, or discontinue nonconforming subsidiaries, assets, and activities.

Paragraph (b) of this section establishes procedures for terminating an election that are intended to be the mirror image of the procedures for making an election, with some exceptions noted below. As with an election, a covered savings association that wishes to terminate an election would be required to notify the OCC of the termination in

writing. The notice would need to be signed by a duly authorized officer. A covered savings association would also be required to provide the OCC with a list of nonconforming subsidiaries, assets, and activities – that is, subsidiaries, assets, and activities (e.g., investments in excess of HOLA limits) that would not be permissible for a Federal savings association. The same effective date timelines and requirements would apply to a request for termination as apply to a notice of election. The OCC could notify a covered savings association that it is not eligible to terminate an election if the covered savings association is not an “eligible savings association” within the meaning of 12 CFR 5.3(g).

A savings association terminating an election would have the same period of time after submitting a notice of termination to divest, conform, or discontinue nonconforming subsidiaries, assets and activities. Generally, this period of time would not exceed two years, but a savings association could request extensions of this time in the manner described in § 101.5 of the proposed rule. A Federal savings association that has terminated its election would not be permitted to retain or continue any subsidiaries, assets, or activities that would be permissible for a national bank but not for a Federal savings association. This includes lending activities that would cause the savings association to violate the QTL test.

Unlike an election, a covered savings association wishing to terminate an election would not be required to identify branches or agencies in operation at the time of termination.

Paragraph (c) of this section specifies that, once a termination takes effect, a Federal savings association is subject to the same provisions of law that apply to other Federal savings associations that are not covered savings associations.

*101.7 Reelection.* This section allows a covered savings association to make a subsequent election after terminating an election.

Under the proposed rule, a Federal savings association that wishes to make a subsequent election after terminating a previous election would be subject to the same requirements as a Federal savings association making an election for the first time.

However, a Federal savings association that previously made and terminated an election to operate as a covered savings association would be required to wait five years after the termination before making a subsequent election. The purpose of this cooling-off period is to prevent institutions from taking advantage of a potential overlap between transition periods for divesting nonconforming subsidiaries and assets and discontinuing nonconforming assets. Under the proposed rule, the OCC has the authority to waive the five-year period for good cause.

*101.8 Evasion.* This section of the proposed rule provides that the OCC may disapprove a notice of election, termination, or reelection if the OCC has reasonable cause to believe the notice is made for the purpose of evading § 101.5 of the proposed rule, including as that section applies to a termination. For example, the OCC might disapprove a covered savings association's notice of termination if it determined the covered savings association was attempting to terminate to take unfair advantage of an overlap between the period to divest, conform, or discontinue nonconforming subsidiaries, assets, and activities provided for an election and the period to divest,

conform, or discontinue nonconforming subsidiaries, assets, and activities provided for a termination.

### **III. Request for Comments**

The OCC encourages comment on any aspect of this proposal and especially on those issues noted in this preamble.

### **IV. Regulatory Analysis**

#### Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 et seq., (RFA), requires an agency, in connection with a proposed rule, to prepare an Initial Regulatory Flexibility Analysis describing the impact of the rule on small entities (defined by the Small Business Administration (SBA) for purposes of the RFA to include commercial banks and savings institutions with total assets of \$550 million or less and trust companies with total revenue of \$38.5 million or less) or to certify that the proposed rule would not have a significant economic impact on a substantial number of small entities. The OCC currently supervises approximately 886 small entities, of which 258 are Federal savings associations.<sup>21</sup> Because the proposed rule does not contain any new recordkeeping, reporting, or compliance requirements, we anticipate that it will not impose costs on OCC-supervised institutions unless they elect to operate as a covered savings

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<sup>21</sup> We base our estimate of the number of small entities on the SBA's size thresholds for commercial banks and savings institutions, and trust companies, which are \$550 million and \$38.5 million, respectively. Consistent with the General Principles of Affiliation 13 CFR 121.103(a), we count the assets of affiliated financial institutions when determining if we should classify an OCC-supervised institution a small entity. We use December 31, 2017, to determine size because a "financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year." See footnote 8 of the U.S. Small Business Administration's Table of Size Standards.

association.<sup>22</sup> Therefore, the OCC certifies that the proposed rule, if implemented, would not have a significant economic impact on a substantial number of OCC-supervised small entities.

#### Unfunded Mandates Reform Act of 1995

Consistent with the UMRA, our review considers whether the mandates imposed by the proposed rule may result in an expenditure of \$100 million or more by state, local, and tribal governments, or by the private sector, in any one year. The proposed rule does not impose new mandates. Therefore, we conclude that the proposed rule will not result in an expenditure of \$100 million or more annually by state, local, and tribal governments, or by the private sector.

#### Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995,<sup>23</sup> the OCC may not conduct or sponsor, and a person is not required to respond to, an information collection unless the information collection displays a valid OMB control number. The OCC has submitted the information collection requirements imposed by this proposed rule to OMB for review.

A Federal savings association seeking to operate as a covered savings association would be required under § 101.3(a) to submit a notice making an election to the appropriate OCC supervisory office that: 1) is signed by a duly authorized officer of the Federal savings association; 2) identifies the branches and agencies that will be in operation on the effective date of the election that have not been the subject of an application or notice under 12 CFR part 5; and 3) identifies and describes any

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<sup>22</sup> We believe that costs associated with electing to be treated as a covered savings association will be minimal and that Federal savings associations will only choose to be treated as a covered savings associations if the benefits outweigh the costs.

<sup>23</sup> 44 U.S.C. 3501 et seq.



nonconforming subsidiaries, assets, or activities that the Federal savings association holds, operates, or conducts at the time its submits its notice.

Under § 101.5(a), the OCC may require a covered savings association to submit a plan to divest, conform, or discontinue a nonconforming subsidiary, asset, or activity.

A covered savings association may submit a notice to terminate its election to operate as a covered savings association under § 101.6 using similar procedures to those for an election. In addition, after a period of five years, a Federal savings association that has terminated its election to operate as a covered savings association may submit a notice under § 101.7 to reelect using the same procedures used for its original election.

Title: Covered Savings Association Notice.

OMB Control No.: To be assigned by OMB.

Frequency of Response: On occasion.

Affected Public: Businesses or other for-profit organizations.

**Election, Termination, Reelection:**

Estimated Number of Respondents: 295

Estimated Burden per Respondent: 2 hours

Estimated Total Annual Burden: 590 hours

**Plan to Divest:**

Estimated Number of Respondents: 25

Estimated Burden per Respondent: 2 hours

Estimated Total Annual Burden: 50 hours

**Total Annual Burden:** 640 hours

In addition, the OCC will file a nonmaterial change at the final rule stage to amend its Licensing Manual Collection (OMB Control No. 1557-0014) to increase the respondent count to reflect additional filings from Federal savings associations.

Comments are invited on:

(a) Whether the collections of information are necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC's estimates of the burden of the collections of information;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collections on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

### **Riegle Community Development and Regulatory Improvement Act of 1994**

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (CDRI Act),<sup>24</sup> in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, the OCC will consider, consistent with the principles of safety and soundness and the public

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<sup>24</sup> 12 U.S.C. 4802(a).

interest: (1) any administrative burdens that the proposed rule would place on depository institutions, including small depository institutions and customers of depository institutions, and (2) the benefits of the proposed rule. The OCC requests comment on any administrative burdens that the proposed rule would place on depository institutions, including small depository institutions, and their customers, and the benefits of the proposed rule that the OCC should consider in determining the effective date and administrative compliance requirements for a final rule.

### **List of Subjects in 12 CFR Part 101**

Administrative practice and procedure, Assets, Reporting and recordkeeping requirements, Savings associations.

### **Authority and Issuance**

For the reasons set forth in the preamble, and under the authority of 12 U.S.C. 93a and 5412(b)(2)(B), chapter I of title 12 of the Code of Federal Regulations is proposed to be amended by adding Part 101 as follows:

### **PART 101 – COVERED SAVINGS ASSOCIATIONS**

Secs.

101.1 Authority and purposes.

101.2 Definitions and computation of time.

101.3 Procedures and standard of review.

101.4 Treatment of covered savings associations.

101.5 Nonconforming subsidiaries, assets, and activities.

101.6 Termination.

101.7 Reelection.

101.8 Evasion.

**Authority:** 12 U.S.C. 93a, 1462a, 1463, 1464, 1464a, and 5412(b)(2)(B).

**§ 101.1 Authority and purposes.**

(a) *Authority.* This part is issued pursuant to sections 3, 4, 5, and 5A of the Home Owners' Loan Act (HOLA) (12 U.S.C. 1462a, 1463, 1464, and 1464a), section 5239A of the Revised Statutes (12 U.S.C. 93a), and section 312(b)(2)(B) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5412(b)(2)(B)).

(b) *Purposes.* This part establishes standards and procedures for a Federal savings association to elect to operate as a covered savings association pursuant to section 5A of the HOLA and clarifies the requirements for the treatment of covered savings associations. It also establishes standards and procedures to terminate an election and to reelect to operate as a covered savings association.

**§ 101.2 Definitions and computation of time.**

(a) *Definitions.* As used in this part:

(1) *Appropriate OCC supervisory office* means the OCC office that is responsible for the supervision of a Federal savings association, as described in subpart A of 12 CFR part 4.

(2) *Covered savings association* means a Federal savings association that has made an election that is in effect in accordance with § 101.3(b).

(3) *Effective date of the election* means, with respect to a Federal savings association, the date on which the Federal savings association's election to operate as a covered savings association takes effect pursuant to § 101.3(b).

(4) *Nonconforming subsidiary, asset, or activity*:

(i) With respect to a covered savings association:

(A) Means any subsidiary, asset, or activity that is not permissible for a covered savings association or, if permissible, is being operated, held, or conducted in a manner that exceeds the limit applicable to a covered savings association; and

(B) Includes an investment in a subsidiary or other entity that is not permissible for a covered savings association; and

(ii) With respect to a Federal savings association that has terminated an election to operate as a covered savings association:

(A) Means any subsidiary, asset, or activity that is not permissible for a Federal savings association or, if permissible, is being operated, held, or conducted in a manner that exceeds the limit applicable to a Federal savings association; and

(B) Includes an investment in a subsidiary or other entity that is not permissible for a Federal savings association.

(5) *Similarly located national bank* means, with respect to a covered savings association, a national bank that has its main office situated in the same location as the home office of the covered savings association.

(b) *Computation of time.* The OCC will compute a period of days for purposes of this part in accordance with 12 CFR 5.12.

### **§ 101.3 Procedures and standard of review.**

(a) *Notice*—(1) *Submission.* A Federal savings association that had total consolidated assets of \$20 billion or less as of December 31, 2017, as reported on the Federal savings association's Consolidated Reports of Condition and Income for December 31, 2017, may make an election to operate as a covered savings association by submitting a notice to the appropriate OCC supervisory office.

(2) *Contents.* The notice shall:

(i) Be signed by a duly authorized officer of the Federal savings association;

(ii) Identify each branch or agency that the Federal savings association operates or will operate on the effective date of the election that has not been the subject of an application

or notice under 12 CFR part 5; and

(iii) Identify and describe each nonconforming subsidiary, asset, or activity that the Federal savings association operates, holds, or conducts at the time it submits the notice, each of which must be divested, conformed, or discontinued pursuant to § 101.5.

(b) *Effective date of the election*—(1) *In general*. An election to operate as a covered savings association shall take effect on the date that is 60 days after the date on which the OCC receives the notice submitted under paragraph (a) of this section, unless the OCC notifies the Federal savings association that it is not eligible in accordance with paragraph (c) of this section.

(2) *Earlier notice*. Notwithstanding paragraph (b)(1) of this section, the OCC may notify a Federal savings association in writing prior to the expiration of 60 days that it is eligible to make an election, and the election shall take effect on the date the OCC so notifies the Federal savings association.

(c) *Federal savings association not eligible*. Prior to the expiration of 60 days after the date on which the OCC receives the notice submitted under paragraph (a) of this section, the OCC may notify a Federal savings association in writing that it is not eligible to make an election to operate as a covered savings association pursuant to this part if the Federal savings association is not an eligible savings association as that term is defined in 12 CFR 5.3(g). If the Federal savings association is subject to a cease and desist order,

consent order, formal written agreement, or Prompt Corrective Action directive, the Federal savings association is not eligible to make an election to operate as a covered savings association unless the OCC informs the Federal savings association in writing that it may be treated as an eligible savings association for purposes of this part.

#### **§ 101.4 Treatment of covered savings associations.**

(a) *In general*—

[OPTION A: (1) *Treatment as a national bank*. Except as provided in this section, a covered savings association shall comply with the same provisions of law that would apply to a similarly located national bank and shall not be required to comply with the provisions of law that apply to Federal savings associations.]

[OPTION B: (1) *National bank activities*. Except as provided in this section, a covered savings association may engage in any activity that is permissible for a similarly located national bank to engage in as part of, or incidental to, the business of banking, or explicitly authorized by statute for a national bank, subject to the same authorization, terms, and conditions that would apply to a similarly located national bank, as determined by the OCC for purposes of this part.]

(2) *Treatment as a Federal savings association*. A covered savings association shall continue to comply with the provisions of law that apply to Federal savings associations for purposes of:



- (i) Governance (including incorporation, bylaws, boards of directors, shareholders, and distribution of dividends);
- (ii) Consolidation, merger, dissolution, conversion (including conversion to a stock bank or to another charter), conservatorship, and receivership;
- (iii) Provisions of law applicable only to Federal mutual savings associations;
- (iv) Offers and sales of securities at an office of a Federal savings association;
- (v) Inclusion of subordinated debt securities and mandatorily redeemable preferred stock as Federal savings association supplementary (tier 2) capital;
- (vi) Increases in permanent capital of a Federal stock savings association;
- (vii) Rules of practice and procedure in adjudicatory proceedings;
- (viii) Rules for investigative proceedings and formal examination proceedings;
- (ix) Removals, suspensions, and prohibitions where a crime is charged or proven;
- (x) Security procedures;

(xi) Maintenance of records and recordkeeping and confirmation requirements for securities transactions;

(xii) Nondiscrimination; and

(xiii) Advertising.

(b) *Existing branches.* A covered savings association may continue to operate any branch or agency that the covered savings association operated on the effective date of the election.

#### **§ 101.5 Nonconforming subsidiaries, assets, and activities.**

(a) *Divestiture, conformance, or discontinuation.* A covered savings association shall divest, conform, or discontinue a nonconforming subsidiary, asset, or activity at the earliest time that prudent judgment dictates but not later than two years after the effective date of the election. The OCC may require a covered savings association to submit a plan to divest, conform, or discontinue a nonconforming subsidiary, asset, or activity.

(b) *Extension.* The OCC may grant a covered savings association extensions of not more than two years each up to a maximum of eight years if the OCC determines that:

(1) The covered savings association has made a good faith effort to divest, conform, or discontinue the nonconforming subsidiary, asset, or activity;

(2) Divestiture, conformance, or discontinuation would have a material adverse financial effect on the covered savings association; and

(3) Retention or continuation of the nonconforming subsidiary, asset, or activity is consistent with the safe and sound operation of the covered savings association.

(c) *Applicable law.* Until a covered savings association divests, conforms, or discontinues a nonconforming subsidiary, asset, or activity, the nonconforming subsidiary, asset, or activity shall continue to be subject to the same provisions of law that applied to the nonconforming subsidiary, asset, or activity on the day before the effective date of the election.

#### **§ 101.6 Termination.**

(a) *Termination.* A covered savings association may terminate its election to operate as a covered savings association, after an appropriate period of time as determined by the OCC, by submitting a notice to the appropriate OCC supervisory office.

(b) *Procedures.* A covered savings association wishing to terminate its election shall comply with, and shall be subject to, the provisions of §§ 101.2, 101.3, and 101.5, except that:

(1) The provisions of §§ 101.3 and 101.5 shall be applied by substituting “covered savings association” for “Federal savings association” and “Federal savings association” for “covered savings association” each place those terms appear in those sections;

(2) Section 101.3(a)(1) and (2)(ii) shall not apply; and

(3) Sections 101.3 and 101.5 shall be applied by substituting “effective date of the termination” for “effective date of the election.”

(c) *Applicable law.* On and after the effective date of the termination, a Federal savings association that has terminated its election to operate as a covered savings association shall be subject to the same provisions of law as a Federal savings association that has not made an election under this part.

#### **§ 101.7 Reelection.**

(a) *Reelection.* A Federal savings association that has terminated its election to operate as a covered savings association may submit a notice to reelect to operate as a covered savings association, if at least five years have elapsed since the effective date of the termination. Upon determining that good cause exists, the OCC may permit a Federal savings association to reelect to operate as a covered savings association prior to the expiration of the five-year period.

(b) *Procedures and treatment.* A Federal savings association reelecting to operate as a covered savings association shall comply with, and shall be subject to, the provisions of this part as if it were making an election for the first time.

**§ 101.8 Evasion.**

The OCC may disapprove any notice submitted pursuant to this part if the OCC has reasonable cause to believe the notice is made for the purpose of evading § 101.5, including as that section applies to a covered savings association terminating an election.

Dated: September 10, 2018

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Joseph M. Otting  
Comptroller of the Currency

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